

STATE OF MICHIGAN
COURT OF APPEALS

JESSICA J. SHIELDS,

Plaintiff-Appellant,

v

JUSTIN J. DEPEW,

Defendant-Appellee.

UNPUBLISHED

May 15, 2007

No. 273555

Ingham Circuit Court

LC No. 01-030329-DM

Before: Markey, P.J., and Sawyer and Bandstra, JJ.

PER CURIAM.

Plaintiff appeals from an order of the circuit court granting primary physical custody of the parties' minor child to defendant. The parties share legal custody of the child. We affirm the custody order but remand for reconsideration of plaintiff's child support obligation.

Plaintiff claims that the trial court abused its discretion when it issued an ex parte order changing physical custody from plaintiff to defendant. "An evidentiary hearing is mandated before custody can be modified, even on a temporary basis." *Grew v Knox*, 265 Mich App 333, 336; 694 NW2d 772 (2005). While "situations might arise in which an immediate change of custody is necessary or compelled for the best interests of the child pending a hearing with regard to permanent change of custody[,] . . . [s]uch a determination . . . can only be made after the court has considered facts established by admissible evidence" *Mann v Mann*, 190 Mich App 526, 533; 476 NW2d 439 (1991). That did not occur in this case. Moreover, a trial court must make specific findings of fact on each of the 12 best interest factors even when entering a temporary order that alters an existing custody order. *Grew, supra* at 337. The trial court did not follow this directive before the ex parte order was issued.

Nonetheless, this error does not require reversal because a de novo hearing was ultimately held and the result from that hearing was not in error. *Mann, supra* at 533 ("Our conclusion that the trial court committed clear legal error does not . . . compel us to reverse the court's final order changing custody, because a hearing de novo was eventually held.").

Plaintiff argues that the trial court's findings of fact issued after the de novo hearing in support of the change of physical custody were against the great weight of the evidence. We disagree. The relevant standard of review was set forth in *Mogle v Scriver*, 241 Mich App 192, 196; 614 NW2d 696 (2000):

We review the trial court's findings of fact to determine whether they are against the great weight of the evidence, the court's discretionary rulings for a palpable abuse of discretion, and questions of law for clear legal error. Under the 'great weight of the evidence' standard, a trial court's findings should be affirmed unless the evidence clearly preponderates in the opposite direction.

The trial court determined that "the established custodial environment has been with" plaintiff. This finding is not at issue on appeal. A modification of the established custodial environment of a child requires clear and convincing evidence that the change is in the best interest of the child. MCL 722.27(1)(c); *Mason v Simmons*, 267 Mich App 188, 195; 704 NW2d 104 (2005). "To determine the best interests of children in custody cases, the trial court must consider the . . . factors of § 3 of the Child Custody Act" and "explicitly state its findings and conclusions with respect to each of these factors." *Bowers v Bowers*, 190 Mich App 51, 54-55; 475 NW2d 394 (1991). The 12 best interest factors are:

(a) The love, affection, and other emotional ties existing between the parties involved and the child.

(b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.

(c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(f) The moral fitness of the parties involved.

(g) The mental and physical health of the parties involved.

(h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(l) Any other factor considered by the court to be relevant to a particular child custody dispute. [MCL 722.23.]

Plaintiff takes issue with the trial court's findings that factors (d), (e), (f), (g), (j), and (l) all favored defendant and that factor (k) was rated equally.

Factors (d) and (e)

Plaintiff objects to the trial court's finding that best interest factors (d) and (e) favored defendant. The evidence established that since the parties' divorce, defendant has been involved in a long term romantic relationship. Conversely, plaintiff has moved several times, has had three different romantic relationships, including living with one man while still married to another, and has been involved in relationships that have included domestic violence and drug use. Further, while plaintiff was living with her parents, the home was subject to a police raid because marijuana was being grown in the basement. Under these circumstances, we do not believe the trial court's weighing of these factors was against the great weight of the evidence.

Factor (f)

Plaintiff objects to the trial court's finding that best interest factor (f) favored defendant because of her admitted cocaine and marijuana use and her inconsistent story as to when she had stopped using drugs. The court concluded that the inconsistency in plaintiff's story meant that "no credible understanding of her current use or disuse can be determined." Plaintiff claims that she was just confused as to the dates. The trial court found that plaintiff "does not fully grasp the significance of the illegality of her drug use." The trial court, as finder of fact, is in a superior position to assess the credibility of the witnesses before it, and we defer to those determinations. MCR 2.613(C); *Mogle, supra* at 201. Therefore, it was not against the great weight of the evidence for the trial court to find that this factor favored defendant.

Factor (g)

Plaintiff objects to the trial court's finding that best interest factor (g) favored defendant given her history of mental illness because this did not take into account her current diagnosis of normal mental health. This assertion is based on an evaluation by David Fulgtae, Ph.D., LLC. Fulgate's findings and conclusions were noted in the referee's recommendation and include the following: "While the obtained results may be an underestimate of potential psychological difficulties, the obtained results suggest no evidence of any significant mental illness at this time." This statement clearly acknowledges the limitations of the evaluation, both with respect to its validity ("may be an underestimate") and its use as a predictor of long-range health ("at this time"). Moreover, plaintiff has a history of mental illness, including several hospitalizations. Fulgate also indicated that he was "concerned about the mother's history of instability with relationships and the allegations of substance abuse." While Fulgate was concerned that defendant "appeared to consciously distort his test responses in an effort to make himself appear unrealistically virtuous," there is no evidence that defendant has ever had any mental health problems of any kind. Further, there was evidence offered about continuing physical difficulties. Under these circumstances, it was not against the great weight of the evidence to find that factor (g) favored defendant.

Factor (j)

Plaintiff claims that the trial court erred when it found factor (j) favored defendant due to plaintiff's repeated violations of the trial court's visitation order. Plaintiff argues that the trial court failed to consider all of the times defendant also failed to give parenting time to plaintiff. But the trial court explicitly found that the few times defendant has kept their minor child over his allotted time, it was only in response to plaintiff's repeated violations. Accordingly, we cannot conclude this finding was against the great weight of the evidence.

Factors (k) and (l)

Plaintiff claims that the trial court erred when it found factor (k) favored neither party. Plaintiff draws a distinction based on her characterization of herself as the victim of domestic violence and her characterization of defendant as the perpetrator of domestic violence. Plaintiff also notes the instances in 2001 and 2004 where Child Protective Services (CPS) investigated allegations that defendant abused the minor child.

This is a close question. Plaintiff testified to two domestic violence incidents with one of her boyfriends. Contrary to plaintiff's characterization of the circumstances, she admitted that Krokker had also accused her of domestic assault. In any event, plaintiff is no longer involved with this man. Conversely, the evidence does establish that defendant ever assaulted plaintiff. Further, CPS did conclude that a preponderance of the evidence established that the minor child had been physically abused in 2001 and that the "rough" play that resulted in injuries to the child in 2004 was "inappropriate," albeit "unintentional."

The circuit court considered the 2001 and 2004 child abuse allegations under best interest factor (l).¹ The court observed that it was "not convinced that the underlying incidents were actually child abuse by the father and is concerned they were actually incidents exaggerated by Plaintiff-Mother to gain advantage with this court." The court also noted that defendant "has cooperated with CPS and has stated he will not engage in similar behavior in the future." Mindful of our deference to the court's credibility determinations, *Mogle, supra* at 201, we are not convinced that the court's findings on factors (k) and (l) were against the great weight of the evidence.

Therefore, it was not against the great weight of the evidence for the trial court to find the best interest factors overall provided clear and convincing evidence that a change of physical custody to defendant would be in the child's best interest. It follows that the trial court did not abuse its discretion in granting primary physical custody to defendant.

Plaintiff next claims that the trial court erred by not considering her two months of unpaid maternity leave in its child support calculations. We disagree. "Child support orders and the modification of such orders are reviewed for an abuse of discretion." *Peterson v Peterson*, 272 Mich App 511, 515; 727 NW2d 393 (2006). "Whether a trial court properly operated within

¹ The referee considered the child abuse allegations when evaluating best interest factor (b).

the statutory framework relative to child support calculations and any deviation from the child support formula are reviewed de novo as questions of law.” *Id.* at 516. See MCL 552.605(2).

Plaintiff’s child support obligation is an ongoing, monthly obligation. Her maternity leave was only temporary. It did not affect her long term, regular income level. Therefore, the trial court did not abuse its discretion when it did not take that into consideration when calculating plaintiff’s long term child support obligation.

Plaintiff also claims that the trial court erred by making plaintiff’s child support obligation retroactive to when defendant was given physical custody in the ex parte order, because at the time the court held the obligation in abeyance until further order of the court. But “[b]iological parents have an inherent obligation to support their children.” *Macomb Co Dep’t of Soc Servs v Westerman*, 250 Mich App 372, 377; 645 NW2d 710 (2002). The court never terminated that obligation; rather, the court left for later determination the amount of that obligation. During the time the parties’ child was in defendant’s care, plaintiff still owed defendant child support. Therefore, the trial court did not abuse its discretion when it made plaintiff’s child support obligation retroactive to when defendant was first given physical custody.

Finally, we remand for the trial court to consider modification of the support order in light of the birth of plaintiff’s child on the last day of the de novo hearing. See MCL 552.605(2). “If the court determines that application of the child support formula would be unjust or inappropriate, the court must set forth its reasons in writing or on the record.” *Gehrke v Gehrke*, 266 Mich App 391, 396; 702 NW2d 617 (2005). See MCL 552.605(2)(d).

We affirm the trial court’s custody determination, but remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ David H. Sawyer
/s/ Richard A. Bandstra